

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,092

849

LEONARD V. DIXON, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,

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*United States Court of Appeals
For the
District of Columbia Circuit*

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Joseph W. Stewart

CLERK

No. 14,092

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Is not the introduction of the physical evidence of narcotics in addition to the testimony of the police officer making a direct purchase sufficient to warrant a judgment of conviction?

2. Is not appellant foreclosed from raising an objection to the instructions for the first time on appeal, having failed to object below; and, in any event, is not the charge complete and proper?

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OTHER REFERENCES

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is a narcotics case. The six count indictment was returned on February 6, 1956 and, on September 13, 1956, appellant was found guilty as charged (R. 136-139). Thereafter, appellant filed a motion for reduction of sentence, which was denied (R. 141-149). On April 22, 1957, a motion to vacate sentence was filed pursuant to 28 U.S.C. § 2255 (R. 150-159). A new trial was granted by the trial court on June 6, 1957 (R. 160).

The jury returned a verdict of guilty on June 26, 1957 (R. 161). After being sentenced (R. 162), appellant filed another motion to vacate under section 2255 (R. 163-171), which was denied. The instant appeal is from the order of judgment and from the order denying the motion to vacate (R. 172).

Officer James Vailes (R. 8-37), an undercover man for the Narcotics Squad on July 23, 1955, was driving in his

cruiser with one Josephus Branick (a special employee of the Narcotics Squad) when he observed appellant on Pierce Street, N.W. Vailes asked appellant if he had any "smack", whereupon "he said he could get some. So he left the car. Before he left the car I gave him four dollars, and the special employee gave him four dollars, and told him we wanted to buy four capsules." (R. 9-10.) Appellant was given six dollars which the men had obtained from the police department (R. 10). Vailes then testified that, "Well he left the car and gone a short while and came back and handed me four capsules containing a white powder." (R. 10-11), to which there was no written order form or tax-stamped package (R. 11).¹

The same type of transaction took place on July 28th, the differences being that the special employee asked appellant, who had come over to the automobile, if he had any "smack" (R. 16). "The defendant said he could cop some smack for us, and he told us to drive the car around to North Capitol and Pierce and wait for him. We did so." (R. 16-17). Officer Vailes gave appellant five dollars and drove the car to the appointed place. "He came back in a short while and handed the informant five capsules, and the informant handed them to me. And I took them to the Narcotics Squad and placed them in a cream-colored envelope and turned them over to Officer Brewer." (R. 17). There was no written order form or tax-stamped envelope (R. 18).²

The cross-examination was extensive (R. 21-37). It was attempted to show that Officer Vailes had only been on the police force a few days when the initial purchase was made and that he was trying to establish a record of arrests. In the attempt to show that the officer "manufactured" this case against appellant, the following occurred (R. 28-29, 31, 32-33):

¹ Each of the four capsules contained heroine hydrochloride, quinine hydrochloride and milk surage; and the package contained six grains (R. 45).

² Each of the five capsules also contained the same type of narcotic drug; and the package contained 5.2 grains (R. 45-46).

"Q. Now what made him or his appearance so clear in your mind? Did he look unlike other people, or what? Did you have an occasion to remember him? You said you were just looking for anybody selling narcotics. What was this man doing that made you think that he was selling narcotics? Was he doing anything?"

"A. Well, sir, I was working with another addict that morning, and the other addict had purchased some drugs from him that same morning."

* * *

"Q. * * * Isn't it a fact that these narcotics that were obtained were obtained from your informer and given to you, and then your informer told you that he obtained these from Dixon, and it was not in your presence?"

"A. No, sir; that isn't the fact."

* * *

"Q. Who was this informer you were supposed to have been with during the morning?"

"A. The man I was with in the morning wasn't an informer for the Police Department. He was an addict himself and he didn't know I was a police officer. He was somebody I had picked up myself out in the street."

Appellant testified in his own behalf (R. 54-88). He admitted being convicted of a prior narcotics offense (R. 55), but denied selling narcotics to Officer Vailes on the dates in question (R. 55). He admitted knowing the special informer who was with Vailes, having served time with him and having known him before they were incarcerated together (R. 60). He denied selling Branick any narcotics (R. 61-62).³

Officer Vailes was recalled as a defense witness to establish the day of the week on which the two transactions occurred (R. 88-90). Charles Taylor—self-employed and

³ From the testimony, it will be observed that Branick was present prior to trial and in the vicinity of the courtroom (R. 62-64).

appellant's employer at the time—testified that he had hired appellant on July 23rd (the date of the first offense), and that appellant worked with him at 905 58th Place (near Chapel Oaks, Maryland) all day on that date (R. 92-93). Appellant was working at 756 Gresham, N.W. on July 28th (the date of the second offense) (R. 94). They would work until about 7 or 7:15 p.m. each day (R. 96), hanging paper (R. 102). Mr. Taylor kept no business records since he made each person working for him a part of his business (R. 99, 122).

STATUTES INVOLVED

Title 21 U.S.C. §174 provides:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years. * * *

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26 U.S.C. §4704(a)—General requirement provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prime facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26 U.S.C. §4705(a)—General requirement provides:

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

SUMMARY OF ARGUMENT

The evidence supports the verdict. The contention that narcotics cases should be governed by *Kelly v. United States*, 90 U.S. App. D.C. 125, 194 F. 2d 150 (1950) (oral invitation to sodomy), was rejected by this Court in *Neal v. United States*, 94 U.S. App. D.C. 418, 215 F. 2d 32 (1954); and *Smith v. United States*, — U.S. App. D.C. — (No. 13519, affirmed by order from the bench, November 26, 1956).

Appellant is barred from objecting the instructions because of his failure to comply with the provisions of Rule 30, F. R. Crim. P. In any event, a study of the instructions, as a whole and in part, reveals no error.

ARGUMENT

I

The Evidence Supports the Verdict

Appellant complains that the Government did not produce the special employee, Branic, at the trial (Br. pp. 3-4, 5-7). He also argues that this case should be controlled by *Kelly v. United States*, 90 U.S. App. D.C. 125, 194 F. 2d 150 (1952) (oral invitation to sodomy). These arguments lack merit.

In the first place, the law is now well settled that the Government is under no obligation to call to the witness stand each and every available witness. *McQuaid v. United States*, 91 U.S. App. D.C. 229, 198 F. 2d 987 (1952), *cert. denied*, 344 U.S. 929; *McGuinn v. United States*, 89 U.S. App. D.C. 197, 191 F. 2d 477 (1951); *Deaver v. United*

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II

The Instructions Were Proper

Appellant maintains that the charge was fatally defective (Br. 4-5). However, since the record shows that appellant filed to comply with Rule 30, F. R. Crim. P, he is foreclosed from raising this issue. The failure to object in this case is especially applicable since the objections on appeal pertain to the general subject matter of reasonable doubt. The failure to object below obviously indicates that these portions of the charge were clearly understood by appellant's counsel when the instructions were given.

In any event, however, there is no error. After having outlined the nature of the offenses involved (R. 131), the court stated, "Now the principal issue in this case seems to be as to whether the defendant had a transaction with Officer Vailes on these two days or on either of them." (R. 131.) The court proceeded to give a general summary of the case for the prosecution and the case for the accused (R. 131-132). The jury was then told that the "... question is for you to determine which version of the case you believe to be correct." (R. 132). Appellant specifically objects to this language (Br. p. 4).

However, it is to be noted that the court continued by instructing on the presumption of innocence (R. 132), and reasonable doubt (R. 132-133). A reading of the charge, in part and as a whole, reveals that it was fair and complete. Appellant was ably defended, fairly tried and justly convicted. There is no cause to reverse the judgment of the jury.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed.

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